BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

IGNACIA M. BANUELOS	)	
Claimant	)	
V.	)	
	)	
EUREST	)	Docket No. 1,048,817
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant, through John Carmichael, requests review of Administrative Law Judge Thomas Klein's August 28, 2015 Award. Kendra Oakes appeared for respondent and insurance carrier (respondent). The Board heard oral argument on August 4, 2016.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations. At oral argument, the parties stipulated the judge's order implicitly awarded claimant future medical treatment, but claimant is nevertheless required to prove any entitlement to future medical treatment upon application. The parties also stipulated claimant's average weekly wage (AWW) was $472.68.

ISSUES

Claimant was injured on December 1, 2008. In nearly six years thereafter, she had 25 two-week pay periods in which her earnings from respondent were less than 90% of her AWW. The judge awarded claimant permanent partial disability (PPD) benefits based on a 5% whole body functional impairment and denied her a permanent partial general disability award (commonly called a "work disability") after finding her post-injury AWW for the approximate six years after her injury was at least 96% of her AWW and a contrary result would be impractical and punish respondent for acting in good faith.

Claimant argues she sustained a 10% whole body impairment and is entitled to work disability benefits for any weeks her biweekly earnings fell below 90% of her AWW. Respondent maintains the Award should be affirmed because claimant is earning or has earned 90% or more of her AWW. Respondent argues the only way to calculate claimant's post-injury AWW is to average her earnings over extended time periods, such as by year or based on the nearly six years of earnings noted in the record.

The issue is what is the nature and extent of claimant's disability, including how to determine her eligibility for work disability benefits?

FINDINGS OF FACT

Claimant, currently 59 years old, began working for respondent as a cook in November 2006. While working for respondent on December 1, 2008, claimant slipped and fell on ice. In her application for hearing, she alleged injuring her neck, low back, shoulders and hands. She testified she injured such body parts and had bilateral leg pain.

Claimant testified she settled a prior workers compensation injury in 1997 involving her arms, shoulders and neck, but not her low back or her legs. She testified her arms, shoulders and neck got better, but worsened after her 2008 accidental injury.[1]

Claimant had conservative treatment that did not provide relief. Claimant was referred to Paul Stein, M.D., a board-certified neurosurgeon, who evaluated her on August 2, 2010. Claimant's daughter acted as a translator because claimant primarily speaks Spanish. Claimant complained to Dr. Stein that she fell at work and had low back pain and radiation of pain into her legs, the left leg more than the right leg. Claimant did not complain to Dr. Stein about her shoulders, arms or wrists.

Dr. Stein's physical examination of claimant's legs was normal except for claimant's inability to appreciate pinprick in her feet to above her ankles. His examination of claimant's lumbar spine revealed diffuse tenderness to palpation and considerable restricted movement. Claimant had positive straight leg raise testing for nerve root irritation. She also had positive Waddell's tests. Dr. Stein stated, "I have some concern regarding symptom magnification in this patient. That is not to state that she does not have real pain and real pathology at L4-L5. This type of magnification, however, is frequently associated with persistent complaints after surgery."[2]

Dr. Stein diagnosed claimant with degenerative disease which was most likely aggravated by the work incident. Dr. Stein did not believe claimant was a surgical candidate, but recommended L4-5 transforaminal epidural injections, weight loss and a long-term strengthening program. Dr. Stein gave claimant temporary work restrictions.

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[1] Over claimant's objection, the judge allowed as evidence medical reports attached to a November 26, 1997 Settlement Hearing Transcript. R.H. Trans., p. 32, 35-36, Resp. Ex. 1. The medical records attached to the settlement hearing transcript were not supported by the testimony of these physicians, contrary to K.S.A. 44-519, and there was no stipulation or agreement between the parties as to the admission of such records. See *Redrick v. S & J Painting, Inc.*, No. 1,049,017, 2013 WL 1876335 (Kan. WCAB Apr. 3, 2013); *Woods v. Air Technologies, Inc.*, Nos. 176,253 & 176,254, 1998 WL 51297 (Kan. WCAB Jan. 30, 1998) and *Zimmer v. Central Kansas Medical Center*, No. 186,009, 1997 WL 229454 (Kan. WCAB Apr. 30, 1997). However, the admissibility of the medical reports was not raised on appeal.

[2] Stein Depo., Ex. 2 at 5-6.

Claimant returned to Dr. Stein on July 21, 2011. Claimant complained of increased pain in her low back which radiated into her left leg and foot. The doctor's physical examination remained nearly the same and he noted possible symptom magnification. Using the AMA *Guides*[3] (*Guides*), Dr. Stein assigned claimant a 5% whole body impairment under DRE Lumbosacral Category II and he testified his clinical examination did not reveal radiculopathy. Dr. Stein noted there was no structural low back injury requiring permanent work restrictions, but suggested claimant avoid lifting more than 40 pounds occasionally and 30 pounds frequently and avoid intensively repetitive bending and twisting of her low back. Dr. Stein reviewed Jerry Hardin's[4] task list and opined claimant had a 56% task loss.

At claimant's attorney's request, Pedro Murati, M.D., a board-certified rehabilitation and physical medicine doctor, evaluated claimant on September 14, 2011. Claimant complained of headaches, irritability, dizziness, mood swings, some memory and concentration loss, numbness and tingling in her back radiating down her legs, nocturnal numbness and tingling in her shoulders and constant shoulders, arms and back pain.

Dr. Murati diagnosed claimant with: (1) bilateral carpal tunnel syndrome (CTS); (2) myofascial pain syndrome affecting her shoulder girdles extending into her cervical paraspinals; (3) bilateral rotator cuff strains versus tears; (4) low back pain with signs and symptoms of radiculopathy; and (5) left SI joint dysfunction. Using the *Guides*, Dr. Murati assigned claimant a combined 34% whole body impairment as follows:

- a 10% right upper extremity impairment for CTS and a 7% right shoulder impairment for loss of range of motion for a combined 16% right upper extremity impairment (which converts to a 10% whole body impairment);

- a 10% left upper extremity impairment for CTS and a 7% left shoulder impairment for loss of range of motion for a combined 16% left upper extremity impairment (which converts to a 10% whole body impairment);

- a 5% whole body impairment under Cervicothoracic DRE Category II for myofascial pain syndrome affecting the cervical paraspinals;

- a 5% whole body impairment under Thoracolumbar DRE Category II for myofascial pain syndrome affecting the thoracic paraspinals; and

- a 10% whole body impairment under Lumbosacral DRE Category III for low back pain with signs and symptoms of radiculopathy.

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

[4] Jerry Hardin, a vocational consultant, interviewed claimant on October 22, 2012, at claimant's attorney's request. The list contained 25 non-duplicative tasks.

While Dr. Murati testified claimant's bilateral carpal tunnel syndrome was mostly from her repetitive work, he opined her other injuries were related to the fall at work. Dr. Murati acknowledged the first documented complaint of neck or shoulder pain following claimant's accident was when he examined her. Dr. Murati believed Drs. Stein and Do did not find radiculopathy because they did not test claimant's hamstring reflex. Dr. Murati testified claimant had lumbar radiculopathy because she had a missing left hamstring reflex, loss of sensation of the left sacral first dermatome, positive straight leg raising bilaterally and a large bulging disc at L4-5 that produced stenosis and was consistent with impinging on the nerve root and causing claimant's left leg symptoms.

Dr. Murati issued permanent restrictions for all of claimant's diagnoses, but the restrictions pertaining only to her low back were: (1) rare crawling and ladders; (2) lifting/carrying/pushing/pulling up to 20 pounds occasionally, 10 pounds frequently and five pounds constantly; and (3) alternating sitting, standing and walking. With respect to claimant's low back only and using Mr. Hardin's list, Dr. Murati opined claimant had a 56% task loss. For all of the ailments Dr. Murati attributed to claimant's accident and her work, he opined she had an 84% task loss.

Pat Do, M.D., a court-appointed neutral physician, evaluated claimant on July 18, 2012. Dr. Do diagnosed claimant with a lumbar strain with non-verifiable radiculopathy. While Dr. Do examined claimant's cervical spine, thoracic spine and upper extremities, he concluded only that claimant's low back injury was related to her December 1, 2008 accident. The doctor's report states, "Her whole body complaints, which are essentially everything else, are not related to this December 1, 2008, incident."[5]

Dr. Do opined claimant's accident aggravated her preexisting low back condition. Dr. Do testified the only objective finding during his physical examination of claimant was when he pushed on claimant's low back and she experienced pain, but stated that finding could also be subjective. Using the *Guides*, Dr. Do assigned claimant a 5% whole body impairment. Dr. Do issued permanent work restrictions of no lifting above 50 pounds, 21-50 pounds occasionally and up to 20 pounds continuously, with no pushing and pulling above 75 pounds, 51-75 pounds occasionally and up to 50 pounds continuously. Using Mr. Hardin's task list, Dr. Do concluded claimant had a 28% task loss.

Claimant continues to work for respondent with permanent restrictions of no lifting more than 20 or 25 pounds and limited bending. She earns $12.12 an hour and works 37.5 hours a week. While she is able to perform her regular duties, she testified doing so causes her "almost unbearable pain."[6]

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[5] Do Depo., Ex. 2 at 2.

[6] R.H. Trans. at 17.

In the 155 two-week pay periods in evidence covering nearly six years post-injury, claimant earned comparable wages or more in 130 pay periods. Claimant earned less than 90% of her AWW in 25 pay periods:

- May 22, 2009, to June 18, 2009
- August 14, 2009, to August 27, 2009
- December 4, 2009, to December 31, 2009
- January 29, 2009, to February 11, 2010
- September 24, 2010, to October 7, 2010
- November 19, 2010, to December 16, 2010
- January 14, 2011, to January 27, 2011
- March 25, 2011, to April 7, 2011
- September 9, 2011, to October 6, 2011
- May 18, 2012, to September 20, 2012
- March 7, 2013, to April 3, 2013, and
- September 19, 2013, to October 2, 2013.

Page three of the August 28, 2015 Award states:

> In the absence of compelling evidence to the contrary, the court places greater weight on the opinions of its own independent examiners, rather than expert witnesses retained by the parties. For that reason the court adopts the opinion of Dr. Do and finds that the claimant has suffered a 5% impairment to the body as a whole as a result of her injury.
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> Claimant argues for a work disability, based on a week by week analysis of the wages that the claimant has earned since her accident. The respondent prepared a week by week breakdown of the claimant's earnings since the time of her accident and attached it to their brief. The breakdown makes clear that there were some weeks that the claimant earned less than 90% of her pre-injury wage. Others she had more. The court agrees with respondent's calculation that the claimant as a whole made at least 96% of her pre-injury wage as a percentage of her total earnings.
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> The court finds that in this circumstance, it is not appropriate to calculate a work disability on a week to week basis. The claimant has continued in the employ of the respondent during the relevant period. In these circumstances, awarding a work disability would be punitive to a respondent that has acted in good faith as well as impractical.
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> The court declines to award a work disability in this case. The claimant has suffered a 5% impairment to the body as a whole and the court issues an award on that basis.

Thereafter, claimant appealed.

PRINCIPLES OF LAW

K.S.A. 44-510e(a) (Furse 2000) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Bergstrom states:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[7]

Bergstrom allows injured workers who have whole body impairment and at least 10% wage loss to get work disability awards regardless of why they have wage loss. Kansas law in effect at the time of claimant's accidental injury did not require any nexus between the wage loss and the injury; rather, calculation of wage loss is just a mathematical equation.[8]

Calculation of a worker's post-injury AWW is a factual determination.[9]

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[7] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[8] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

[9] *Criswell v. U.S.D. 497*, No. 104,517, 2011 WL 5526549 (Kansas Court of Appeals unpublished opinion filed Nov. 10, 2011), *rev. denied* 296 Kan. 1129 (2013).

ANALYSIS

The Board affirms the judge's decision that claimant sustained a 5% permanent impairment of function involving her low back as a result of her December 1, 2008 accidental injury. The greater weight of the evidence limits her injury to a 5% rating for her low back, as found by a treating physician, Dr. Stein, and the court-ordered physician, Dr. Do. Dr. Murati's opinion is afforded less weight, as it provides claimant impairment for body parts we deem were not injured in, or aggravated by, the accident.

The judge denied claimant work disability benefits because "awarding a work disability would be punitive to a respondent that has acted in good faith as well as impractical." The Board disagrees with this reasoning, but nevertheless agrees with the result of the judge's Award.

Under *Bergstrom*, the "good faith" of a party is irrelevant in awarding work disability benefits. Whether one party is being "punished" should be outside our consideration when interpreting and applying the law. Our analysis should not be whether it is practical or convenient to have varying periods of functional impairment and work disability. Our analysis should be whether claimant is statutorily entitled to work disability benefits when she made less than 90% of her AWW, including how to compute her post-injury AWW.

Claimant agrees K.S.A. 44-510e(a) requires a comparison of the AWW a worker earned at the time of injury and the worker's post-injury AWW. The problem, according to claimant, is the statute does not instruct us on the time frame upon which to calculate the post-injury AWW. The statute does not instruct us to use days, weeks, months, years or any set criteria. Given the lack of explanation, claimant says there is a theme in the Kansas Workers Compensation Act (KWCA) of providing benefits on a weekly basis. Claimant contends the reference in K.S.A. 44-510e(a) to a post-injury AWW should be read to mean a week, or in her case, two weeks based on her pay period, to be in pari materia with multiple references to weekly benefits set forth in the KWCA.

The KWCA frequently refers to benefits being tied to a week, for example, K.S.A. 44-503a (average gross weekly wages from multiple employments), K.S.A. 44-510a (reduction in compensation for weeks of disability when a prior compensable permanent injury contributes to the resulting disability), K.S.A. 44-510b (weekly compensation after initial payment to a surviving spouse and/or dependent children), K.S.A. 44-510c (weekly payments for permanent total and temporary total disability), K.S.A. 44-510d (permanent partial disability benefits under the schedule), K.S.A. 44-510e (temporary or permanent partial disability), K.S.A. 44-511 (average weekly wage), K.S.A. 44-512a (civil penalties for failure to pay weekly compensation) and K.S.A. 44-525 (credit for overpayment of TTD against final and preceding weeks of compensation). Also, K.S.A. 44-512 states compensation payments should be made at the same time, place and in the same manner as the wages of the worker at the time of the accident. Therefore, if a worker was paid every two weeks, workers compensation payments should be made every two weeks.

The Board agrees with claimant that K.S.A. 44-510e(a) does not say to compare a worker's AWW with a post-injury AWW based on an average derived over a definite time frame. The problem with comparing averages to averages is the sample size. We could compare an AWW with a post-injury AWW that only concern days, a week or two weeks instead of 26 weeks, one year or any other time frame based on arbitrary starting and ending points. Claimant argues respondent's request to base the post-injury AWW on individual years or nearly six years would be to write language into the statute that does not exist. The same would be true if we agreed with claimant's argument to use two-week pay periods. K.S.A. 44-510e(a) simply does not say to use a two-week pay period, or any other time frame, to derive a post-injury AWW.

Claimant asserts the purpose of workers compensation is wage loss replacement. Given that *Bergstrom* tells us an injured worker is not entitled to work disability benefits when the worker is earning at least 90% of his or her AWW, such benefits should be payable where the worker is earning less than 90% of his or her AWW.

A good starting point is to ascertain what the Supreme Court of Kansas has done with this issue. In *Graham*,[10] the judge divided an injured worker's post-injury earnings of $25,658.74 over 67.29 weeks to arrive at a post-injury AWW of $381.32, even though the evidence regarding post-injury earnings contained contradiction, duplicity and inconsistencies. The Board affirmed the judge's calculation of Graham's post-injury AWW and award of work disability benefits. The Kansas Court of Appeals reversed and denied a work disability award, concluding Graham had the ability to earn at least 90% of his average weekly wage. The Kansas Court of Appeals specifically noted Graham demonstrated the ability to earn very close to 90% of his AWW in 31 of 60 post-injury weeks.[11]

The Supreme Court of Kansas reversed and reinstated the Board's award. The Court expressed reluctance to apply the doctrine of operative construction and indicated there is no need to resort to statutory construction where a statute is plain and unambiguous. The *Graham* opinion noted, "The wage loss percentage is defined by the plain language of the statute as 'the difference between the [preinjury] average weekly wage . . . and the [postinjury] average weekly wage.'"[12] The ruling further stated:

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[10] *Graham v. Dokter Trucking Group*, No. 1,006,954, 2005 WL 5629025 (Kan. WCAB Nov. 1, 2005).

[11] *Bergstrom*, *supra*, ended the practice of examining a worker's capability to earn wages in assessing work disability. Rather, actual post-injury earnings were used for the work disability calculation.

[12] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 556, 161 P.3d 695 (2007). In *Graham*, the standard of appellate review was to view the facts in a light more favoring the Board's decision than the appellant, but the current standard requires review of whether the evidence supporting the Board's decision is substantial in light of all the evidence. *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 362-63, 212 P.3d 239 (2009).

> The Court of Appeals panel also reexamined claimant's postinjury records and found that, in certain weeks, he earned 90 percent or close to 90 percent of his preinjury wages. 36 Kan.App.2d at 527. In doing so, the panel implicitly rejected the apples-to-apples approach of the Board and ALJ, *i.e.*, comparing preinjury and postinjury weekly *averages* rather than comparing a preinjury average to cherry-picked postinjury weeks. Again, the plain language of the statute did not support the panel's method; the statute repeatedly references gross weekly wage averages.
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> The ALJ and Board calculated claimant's resulting average postinjury wage, as was directed in K.S.A. 44-510e(a).[13]

Graham may be distinguishable. While the evidence of post-injury earnings was subpar in *Graham*, the evidence of claimant's post-injury earnings is clear in this case. Perhaps a comparison of individual post-injury weeks in *Graham* was difficult, but that is not true in this case. Also, there is no indication in *Graham* that the parties argued entitlement to work disability should depend on a comparison of a worker's AWW with a post-injury AWW or post-injury pay period. Nevertheless, *Graham* mandates a comparison of pre-injury and post-injury *averages* to calculate a worker's AWW and post-injury AWW. *Graham* endorses aggregating post-injury wages and dividing them by the number of weeks worked to arrive at a post-injury AWW. *Graham* seemingly tells us not to look at individual weeks to assess whether an award of work disability is appropriate.

In another case, *Nistler*,[14] the Board concluded an injured worker's post-injury AWW should be determined using the directives in K.S.A. 44-511 that establish a worker's AWW at the time of the injury. The Board concluded the injured worker was employed after his injury as a full-time employee, such that his post-injury AWW would be based on an imputed 40-hour work week, in addition to overtime, regardless of his actual hours worked. "Although the result may appear harsh nonetheless that is what the statute requires in order to compare 'apples to apples.'"[15]

This method of imputing a hypothetical 40-hour work week to determine a post-injury AWW was rejected by the Kansas Court of Appeals, which concluded using K.S.A. 44-511 to calculate a worker's post-injury AWW is inappropriate because such statute only applies to determine a worker's AWW at the time of his or her accidental injury and a worker's actual post-injury wages should be used to determine his or her post-injury AWW. Unfortunately, *Nistler* did not provide further direction:

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[13] *Graham*, 284 Kan. at 558-59.

[14] *Nistler v. Footlocker, Inc.*, No. 1,024,626, 2007 WL 2586175 (Kan. WCAB Aug. 30, 2007).

[15] *Id.* at *5.

> We do not presume to give further direction to the Board as to what formula or guidelines should be followed to determine Nistler's actual post-injury wage. The appropriate method should be left to the Board, whose members have the expertise and experience to formulate a sound approach.[16]•

On remand, the Board in *Nistler* noted competing arguments by the parties that the post-injury AWW should be based on week-to-week assessments or based on the average of all post-injury earnings divided by the time worked. The employer argued that recalculating the employee's entitlement to work disability on a week-to-week basis was cumbersome, but required by the law. Following *Graham*, the Board stated, "[T]he determination of claimant's actual post-injury average weekly wage, where the weekly wage fluctuates, contemplates a calculation of an average earned over a period of time in order to accurately assess the actual post-injury average wage."[17] The Board determined Nistler had two different post-injury AWWs based on a change in his job classification. For June 28, 2005, through June 17, 2006, Nistler had a 28% wage loss and from June 18, 2006, until at least February 10, 2007, and forward, he had a 26% wage loss.

On appeal of the Board's ruling, the employer argued the work disability entitlement must be analyzed by pay period. The Board's calculations in *Nistler* were affirmed by the Kansas Court of Appeals without significant discussion: "[W]e concur in the Board's application of K.S.A. 44-510e(a) and determination of Nistler's postinjury weekly wages."[18]

The Board has calculated an injured worker's post-injury AWW on a yearly basis by dividing the total earned in a year by the number of weeks the worker was employed during the year. For instance, in *Wohlford*, the Board noted:

> Form 1099s and an accounting spreadsheet from RJR were entered into evidence. Those documents indicate claimant received $22,595 in salary and bonuses in 2006 for the 45 weeks that she worked for RJR during that calendar year. Those same documents also indicate claimant received $27,175 during 2007 and $16,285 for 28 weeks that she had worked for RJR in 2008.
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> Accordingly, the Board finds claimant's post-injury average weekly wage from February 20, 2006, through December 31, 2006, was $502.11. What is more, the Board finds claimant's post-injury average weekly wage for purposes of K.S.A. 44-510e [footnote omitted] commencing January 1, 2007, was $522.60 and commencing January 1, 2008, was $581.61.[19]

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[16] *Nistler v. Footlocker Retail, Inc.*, 40 Kan. App. 2d 831, 841, 196 P.3d 395 (2008).

[17] *Nistler v. Footlocker, Inc.*, No. 1,024,626, 2009 WL 4674069, at *2 (Kan. WCAB Nov. 18, 2009).

[18] *Nistler v. Footlocker Retail, Inc.*, No. 103,539, 2010 WL 4393969 (Kansas Court of Appeals unpublished opinion filed Oct. 29, 2010)

[19] *Wohlford v. Bombardier Aerospace/Learjet*, No. 1,021,347, 2009 WL 978925, at *4 (Kan. WCAB Mar. 31, 2009); see also *Nicholson v. Signature Builders, LLC*, No. 1,056,556, 2013 WL 5521837, at *10 (Kan. WCAB Sept. 17, 2013) *Dvorak v. Carlson Trucking, Inc.*, No. 1,021,211, 2009 WL 1996463, at *4 (Kan. WCAB June 30, 2009).

The Kansas Court of Appeals affirmed the Board in *Wohlford*:

> Learjet's second argument is that the Board wrongly calculated Wohlford's postinjury average weekly wage by dividing the total yearly earnings by the number of weeks worked. Learjet insists that the Board should first separate bonus pay from normal weekly wages, then calculate the base wage from the normal weekly wages, and last add the base wage to the weekly value of each year's bonuses. Learjet would make different calculations for each time period in which Wohlford had a different pay rate on a weekly basis.
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> The determination of the employee's postinjury earnings is ultimately a factual matter. The Board has adopted a relatively simple procedure to calculate Wohlford's postinjury earnings, taking the yearly pay (including bonuses) and dividing that by the number of weeks she worked. The method is simple, but we see nothing in its simplicity that undermines its accuracy or reasonableness. Nor do we find any language in the statute that requires the Board to use the specific methodology Learjet suggests. See *Nistler*, 40 Kan.App.2d at 841, 196 P.3d 395.[20]

In *McFerrin*, the Kansas Court of Appeals affirmed the Board's determination of a self-employed injured worker's post-injury average weekly wage by dividing his net profit of $7920.32 by 34.71 weeks, representing the period from January 1, 2013, through August 31, 2013. *McFerrin* states, "Here, the Board made reasonable calculations and recalculations based on the best available evidence. The financial records and explanatory testimony presented by the McFerrins was relevant and possessed sufficient substance to support the Board's determination."[21]

The Board has calculated a post-injury AWW based on a 46-week period spanning two years.[22] However, in a pre-*Graham* and pre-*Nistler* case, the Board rejected a judge calculating a post-injury AWW by aggregating all of a worker's earnings over parts of three years and dividing the total by 93.14 weeks; the Board instead found it "more appropriate" to calculate the worker's post-injury AWW based on individual years.[23]

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[20] *Wohlford v. Bombardier Aerospace/Learjet, Inc.*, No. 102,330, 2010 WL 5185766, at *4-5 (Kansas Court of Appeals unpublished opinion filed Dec. 17, 2010).

[21] *McFerrin v. Federal Express Corp.*, No. 112,129, 2015 WL 5010057, at *7 (Kansas Court of Appeals unpublished opinion filed Aug. 14, 2015).

[22] *Hunt v. Tom Owens Plumbing, Inc.*, No. 1,051,770, 2012 WL 1142964 (Kan. WCAB Mar. 26, 2012).

[23] *Backman v. Armour Swift Eckrich*, No. 1,003,798, 2006 WL 328202, at *5 (Kan. WCAB Jan. 25, 2006).

The Board has also recalculated wage loss whenever a claimant's wage loss percentage changes:

> Simply stated, after every change in the percentage of disability, a new calculation is required to determine if there are additional disability weeks payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability. This calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.[24]

The Board has ruled injured workers are entitled to work disability benefits for any periods during which he or she earned less than 90% of his or her AWW.[25] In *Criswell*,[26] the Board found a claimant had three different periods of wage loss (some spanning weeks, months and years) based on different post-injury AWWs. The Kansas Court of Appeals affirmed the Board's ruling and agreed with the Board's finding that Mr. Criswell's last wage loss was based on his average of 33.21 actual hours worked during a week over a 4.57 week period, which it indicated was a "reasonable calculation."[27]

Our Supreme Court, in *Graham*, advocates an "apples to apples" approach to determining AWW and post-injury AWW, at least in terms of comparing averages to averages. *Graham* affirmed the calculation of a post-injury AWW over a 67.29 week period and cautioned against "comparing a preinjury average to cherry-picked postinjury weeks." Picking and choosing what weeks to compare, in lieu of considering averages, seems to be precisely what the Supreme Court of Kansas tells us not to do. *Wohlford* affirmed the Board's recalculation of a worker's post-injury AWW on a year-to-year basis. The Board's final ruling in *Nistler* – determination of two different post-injury AWWs based on a nearly one year period and an approximate eight month period – was affirmed by the Court of Appeals. *Wohlford, Criswell* and *McFerrin* focus on whether the Board's decisions in calculating postinjury AWW were reasonable.

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[24] *Somrak v. Akal Security*, No. 1,026,000, 2010 WL 1445595, at *9 (Kan. WCAB Mar. 22, 2010).

[25] See *Eder v. Hendrick Toyota*, Nos. 1,064,108, 1,064,109, 2015 WL 6776996 (Kan. WCAB Oct. 30, 2015); *Smith v. LaFarge North America*, No. 1,052,442, 2013 WL 6920080 (Kan. WCAB Dec. 24, 2013); *Steckly v. Agco Corp.*, No. 1,039,054, 2013 WL 1876331 (Kan. WCAB Apr. 15, 2013); *Wardell v. General Motors Corp.*, No. 1,040,310, 2012 WL 6811282 (Kan. WCAB Dec. 20, 2012); *Jean-Pierre v. Temple-Inland, Inc.*, No. 1,036,662, 2010 WL 1445605 (Kan. WCAB Mar. 31, 2010); *Rivera-Garay v. McCrite Plaza Retirement Community*, No. 1,000,191, 2010 WL 517308 (Kan. WCAB Jan. 29, 2010). While some of these cases are for accidents after May 15, 2011, the Board has often used this approach.

[26] *Criswell v. U.S.D. 497*, No. 1,036,248, 2010 WL 2242749 (Kan. WCAB May 27, 2010).

[27] *Criswell, supra,* at fn. 9.

The precedential appellate cases cited herein seem to indicate it is reasonable to calculate a post-injury AWW based on lengthy time periods ranging from 34.71 weeks (*McFerrin*) to 67.29 weeks (*Graham*) and almost a year (*Nistler*) or yearly (*Wohlford*). Based on the evidence in this case, whether we compared claimant's AWW with her yearly post-injury wages or over the nearly six years of earnings in evidence, her post-injury AWW was at least 90% of her AWW, such that she is not entitled to work disability.

CONCLUSIONS

Claimant is not entitled to work disability because she averaged earning at least 90% of her AWW after her injury.

AWARD

WHEREFORE, the Board affirms the result of the August 28, 2015 Award.

IT IS SO ORDERED.

Dated this _____ day of August, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENTING OPINION

Bergstrom instructs us to look at actual post-injury earnings to determine if a worker is entitled to work disability benefits. K.S.A. 44-510e(a) tells us to compare a worker's AWW and post-injury AWW, but it vaguely and ambiguously does not instruct on how to calculate the worker's post-injury AWW. The statute does not tell us to use an average calculated over a day, days, a week, weeks, a month, months, a year or years. An "average" could be based on a small sample size, *i.e.*, a biweekly pay period, or a larger sample size, for instance the approximate six years suggested by respondent. Still, the statute provides no guidance.

K.S.A. 44-510e(a) states an injured worker cannot get permanent partial general disability in excess of his or her functional impairment "as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." Based on such language, the statute implies PPD benefits in excess of functional impairment (work disability benefits) are recoverable if the worker is earning wages less than 90% of his or her AWW.

Graham and *Nistler* provide some general guidance, but do not directly address claimant's argument that the comparison between her AWW and her post-injury AWW should be based on, in her case, at a minimum, biweekly post-injury averages, and at most, a period in which she had 18 consecutive weeks of earning less than 90% of her AWW.

Graham is not truly on point. In that case, our Supreme Court said the Court of Appeals erred by looking at some of the injured worker's post-injury weekly earnings to show he retained the ability to earn at least 90% of his AWW or at least close to that amount. Evidence of the weeks in which the worker earned less than 90% of his AWW were apparently disregarded because the Court of Appeals wanted to avoid a result where the worker could manipulate his post-injury AWW based only on subjective pain complaints. The Supreme Court drew "a distinction with impact between the actual 'engaging in work' of the statute and the theoretical 'able to earn' of the Court of Appeals."[28] In the present case, analysis of weekly post-injury earnings is not improper cherry-picking, but is rather a dutiful consideration of the entirety of the actual evidence, not just the evidence that tends to support one party to the disadvantage of the other party.

The Supreme Court further noted the Court of Appeals erred by reweighing the Board's factual determination instead of viewing the evidence in the light most favorable to the prevailing party.

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[28] *Graham*, 284 Kan. at 558.

Graham does not stand for the position that the worker's actual post-injury earnings should be explored on a week-to-week or biweekly basis to determine eligibility for work disability benefits. There is also no showing in *Graham* that either party argued for or against doing so. *Graham* also does not indicate there is only one way to calculate a post-injury AWW. *Graham* does not specifically preclude examining a worker's entitlement to work disability benefits when there are weekly or biweekly fluctuations in post-injury earnings. Simply because *Graham* affirmed the Board's methodology does not make that method the best or most legally correct one.

In *Nistler*, the employer argued that a worker's eligibility for work disability benefits was dependent on a week-by-week analysis. The Board cited *Graham* as persuasive authority to calculate Mr. Nistler's two post-injury AWWs based on periods of almost one year and almost eight months. In a very brief opinion, the Court of Appeals affirmed the Board's decision.

However, the Board in *Nistler* did not address the employer's argument that a post-injury AWW may be calculated based on comparison of the AWW and the worker's actual post-injury weekly earnings. Rather, the Board's final ruling in *Nistler* seems to say that because *Graham* approved the Board's factual determination of a post-injury AWW based on a large period, the methodology to calculate the post-injury AWW must be done over an extended time period. *Graham* does not so conclude. As noted above, *Graham* simply does not address the argument that a post-injury AWW may be calculated based on comparison of the AWW and the worker's actual post-injury earnings on a biweekly basis. More than anything, *Graham* rejected the Court of Appeals' cherry-picking and reweighing of the facts. Also, the Court of Appeals' second decision in *Nistler* did not specifically address an employer's argument that a worker's entitlement to work disability benefits should be made on a comparison of the AWW with actual post-injury weekly earnings.

I see nothing unreasonable in compensating claimant for weeks she earned less than 90% of her AWW, especially when *Bergstrom* tells us the reason for the worker's wage loss is irrelevant and a worker's theoretical ability to earn more money does not overcome actual post-injury earnings. Moreover, even though a detailed comparison of claimant's AWW and her various biweekly periods of post-injury wage loss may seem inconvenient, it can be easily done based on the straightforward facts of this case. The parties have already laid out the comparison. The only debate is the size of the periods used to determine the post-injury AWW. The answer is not spelled out in K.S.A. 44-510e(a).

Finally, my proposed methodology is more equitable than that used by the majority. Take, for instance, a situation in which a worker works 12 months post injury, but for whatever reason, has significant enough wage loss in the twelfth month to bring the post-injury AWW over the 12 months to 89% of his or her earnings for the amalgamated period of a year. Is that worker now entitled to work disability benefits for the entire year? If so,

that would be an economic windfall for the worker. Alternatively, an injured worker may have a significant period of time earning less than 90% of his or her AWW, during which work disability benefits should be payable, followed by a bonus or a period of significant overtime earnings that brings the entire post-injury AWW to be in excess of 90% of his or her AWW, thus potentially precluding payment of work disability benefits. These scenarios were raised by an employer in *Nistler*. Such employer proposed:

> There is one way to avoid this result, and that is to follow the strict statutory provision that "any work" with compensation of more than 90 percent of pre-injury wage bars work disability "as long as" that work continues. Using the strict statutory language without enhancement or gloss, this effect can only be achieved by relying on the objective, verifiable standard of pay periods - an approach comparable but not identical to the pre-injury wage calculation. And, of course, this literal approach to statutory application is the one called for by the Supreme Court in its most recent announcements of Kansas workers compensation law. *See, e.g., Casco v. Swift-Eckrich Co.*, 283 Kan. 508,521,154 P.3d 494 (2007); *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009), *and Tyler v. Goodyear Tire & Rubber Co.*, ___ Kan.App.2d ___ (No. 102,236 Feb. 26, 2010) (2010 Kan.App. LEXIS 19).[29]

These arguments and the proposed solution have never been addressed. This issue of how to calculate a post-injury AWW has come up before, it is before us now and it has not been directly addressed by appellate courts, other than to say that the Board's factual determinations of a post-injury AWWs were reasonable. Comparing a worker's actual post-injury pay period earnings to his or her AWW is reasonable and equitable and not susceptible to manipulation, intentional or not, by either party.

_____
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[29] See Brief of Respondent and Insurance Carrier in *Mark Nistler v. Footlocker Retail, Inc.*, 2010 WL 1436756 (filed March 11, 2010) at *10.